

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

TRAVIS COOPER,
Petitioner,
vs.
TIM VIRGA, Warden,
Respondent. } Case No. CV 12-4905-MWF (JPR)
} ORDER ACCEPTING FINDINGS AND
} RECOMMENDATIONS OF U.S.
} MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file, and Report and Recommendation of the U.S. Magistrate Judge. On April 3, 2014, Petitioner filed objections to the R&R, and he filed supplemental points and authorities on May 12. On June 30, 2014, at the Court's direction, Respondent filed a reply to Petitioner's filings.

Petitioner complains loudest about the Magistrate Judge’s finding that the state courts were not objectively unreasonable in upholding his gang enhancement under California Penal Code section 186.22(b)(1) against his sufficiency-of-the-evidence challenge. (Objections at 8-11 & Supplemental P.&A. (discussing R&R at 32-40).) He again points out that the same division of the second appellate district of the court of appeal earlier reversed his codefendant’s gang enhancement

1 based on the argument Petitioner makes (see R&R at 40 n.13 (citing People v.
2 Allah, No. B207446, 2009 WL 2517567 (Cal. Ct. App. Aug. 19, 2009), and
3 addressing Petitioner's argument)). In his supplemental points and authorities
4 Petitioner cites a recent second appellate district court of appeal decision from a
5 different division reversing a gang enhancement in somewhat similar
6 circumstances, see People v. Garcia, 224 Cal. App. 4th 519 (Ct. App. 2014).
7 Respondent argues that this claim is not exhausted and so should be dismissed by
8 the Court.

9 This Court views Petitioner as, right now, really making two different
10 claims. He is claiming insufficiency of the evidence (a federal constitutional
11 claim) for his gang enhancement and his conviction generally. Petitioner is next
12 making a congeries of ill-defined claims based on the new Garcia case, perhaps
13 asserting fundamental fairness or a California understanding of the gang
14 enhancement. The issues Petitioner puts forth in his supplemental points and
15 authorities by citing to Garcia are not articulated as claims for relief in his Petition.
16 The Court therefore does not consider them to be part of Mr. Cooper's current
17 Petition and does not take any position on the merits of whatever claims may arise
18 from the California Court of Appeal's decision in Garcia. To the extent that
19 Respondent later asserts that these Garcia claims were before this Court and a
20 California court should agree, then this Court states that it views these Garcia
21 claims as unexhausted, and would have dismissed them without prejudice. See
22 Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005) (holding that as a matter of
23 comity, a federal court should refrain from addressing an unexhausted habeas
24 claim unless "it is perfectly clear that [Petitioner] failed to present a colorable
25 federal claim.").

26 Apart from Garcia, Petitioner does include in his Petition exhausted claims
27 for insufficiency of the evidence concerning his gang enhancement, and also his
28 murder and conspiracy to commit murder convictions (Objections at 2-8). As to

1 these claims, he simply reargues the evidence. Therefore, AEDPA forbids this
 2 Court to grant relief. 28 U.S.C. § 2254(d)(1).

3 But even aside from AEDPA, the Petition simply fails to state any federal
 4 constitutional claim. Under Ninth Circuit law, the evidence is sufficient to satisfy
 5 the Constitution. United States v. Nevils, 598 U.S. F.3d 1158 (9th Cir. 2010) (*en*
 6 *banc*). In Nevils, the Ninth Circuit explained that a court reviewing a criminal
 7 conviction must undertake two steps in evaluating the sufficiency of the evidence.
 8 First, it must construe evidence in the light most favorable to the prosecution. Id. at
 9 1164. Second, it must determine “whether the evidence so viewed is adequate to
 10 allow ‘any rational trier of fact [to find] the essential elements of the crime beyond
 11 a reasonable doubt.’” Id. (citing Jackson v. Virginia 443 U.S. 307, 319, 99 S. Ct.
 12 2781, 61 L. Ed. 2d 560 (1979)). In conducting the second step, the Court may not
 13 ask whether a finder of fact could have construed the evidence produced at trial to
 14 support acquittal. Id. at 1165. Therefore, even without reviewing the petition with
 15 the deference required by AEDPA, the Court would come to the same conclusion
 16 under Nevils. The Court cannot conclude that all rational fact finders would have
 17 to have determined that there was insufficient evidence of all the elements of the
 18 crime beyond a reasonable doubt.

19 Indeed, Petitioner neglects to mention the most salient piece of evidence
 20 tying the phone found in the getaway car to him: the entry in its contacts of “mom”
 21 for his mother. (Lodged Doc. 23, 4 Rep.’s Tr. at 373.) There could hardly be more
 22 definitive proof that the phone was being used by him. Moreover, he is simply
 23 incorrect when he argues that “[t]he phone in the car was called by ‘Jamaal’ rather
 24 than the other way around.” (Objections at 5; see also id. at 6.) The jury heard
 25 evidence, supported by call records, that Jamaal told the police Petitioner called
 26 him shortly before the murder and told him who was going to do the shooting.
 27 (Lodged Doc. 22, 3 Clerk’s Tr. at 457-58, 461-63, 502; Lodged Doc. 23, 4 Rep.’s
 28 Tr. at 406, 439, 5 Rep.’s Tr. at 469.) Petitioner concedes that a call was made but

1 denies making it. (Objections at 6.) The jury was entitled to believe the evidence
2 to the contrary.

3 Petitioner's objections to the Magistrate Judge's conclusions concerning his
4 Brady and prosecutorial-misconduct claims mostly simply repeat arguments he
5 made in the Petition and Traverse. (Id. at 11-17.) Moreover, as to the
6 prosecutorial-misconduct claim, his objections appear to rely exclusively on direct-
7 appeal cases (see id. at 14-17), in which AEDPA deference does not apply.
8 Petitioner's claim concerning the "suborning of perjury" is still unclear (id. at 17-
9 18); to the extent there was some sort of inconsistency between the two police
10 officers' testimony at the preliminary hearing and at trial concerning the cell phone
11 and "D-Short," Petitioner's counsel cross-examined one of the officers concerning
12 the appearance of "D-Short" on the phone (Lodged Doc. 23, 4 Rep.'s Tr. at 447-
13 48) and successfully moved to strike testimony about it by the other officer
14 (Lodged Doc. 23, 3 Rep.'s Tr. at 130-31). Presumably, and not surprisingly, the
15 jury found the "D-Short" evidence not to be material. Again, although some small
16 amount of evidence could be interpreted as linking the phone to another user, the
17 evidence that Petitioner was its primary user was very strong indeed. (See R&R at
18 29-30.) The jury was not required to adopt Petitioner's speculation.

19 As the Magistrate Judge concluded, Petitioner's cumulative-error claim does
20 not warrant relief. Petitioner now seems to claim that he was prevented from
21 presenting additional phone records at trial. (Objections at 19.) But the issue
22 raised in the Petition was whether the trial court erred in allowing the prosecution
23 to use summaries of the call records. (Pet. at 22.) It did not. (See R&R at 56-59.)
24 Petitioner asserts that the amendment of the information shortly before the end of
25 the presentation of evidence was prejudicial, contrary to the Magistrate Judge's
26 conclusion, because "it allowed the petitioner to be punished for something he did
27 not do but rather for another person's actions." (Objections at 20.) But of course
28 the law allows that, see Cal. Penal Code section 12022.53(e) (applying

1 enhancements when principal used firearm), and as the Magistrate Judge pointed
2 out, Petitioner was on notice from the very start of the trial that the prosecution's
3 theory of the case was that someone, not necessarily Petitioner, fired one or more
4 guns from the car (R&R at 61). That was all that was required. Petitioner's other
5 contentions in his cumulative-error claim do not warrant relief for the reasons
6 stated in the R&R. Although this Court might have inquired further of the jurors
7 concerning their exposure to the unredacted transcript, the trial court did conduct
8 an inquiry and properly admonished the jury to disregard the erroneously
9 distributed transcript. (R&R at 62-63.) The state courts were not objectively
10 unreasonable in finding that no prejudice occurred.

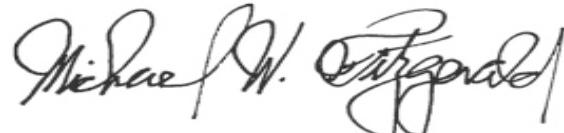
11 As to Petitioner's other claims, he asserts in the Objections that he stands on
12 the arguments in the Petition and Traverse. For the reasons stated in the R&R, the
13 Magistrate Judge did not err in rejecting those claims.

14 Having reviewed de novo those portions of the Report and Recommendation
15 to which objections were filed, the Court accepts the findings and
16 recommendations of the Magistrate Judge.

17 Accordingly, the Petition is **DISMISSED with prejudice**, since the Garcia
18 claims are not included in this Petition. If a California court should view the
19 Garcia claims as included in this Petition, then those claims (and only those claims)
20 are **DISMISSED without prejudice**. The request for an evidentiary hearing is
21 **DENIED**. Let Judgment be entered accordingly.

22 IT IS SO ORDERED.
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24 DATED: September 16, 2014.
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MICHAEL W. FITZGERALD
United States District Judge

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